TING NGUK YONG

v.

BANK UTAMA (MALAYSIA) BHD

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[BANKRUPTCY NO: 29-432-95-III]
17 OCTOBER 1998

BANKRUPTCY: *Adjudication order - Annulment - Application under s. 105 of Bankruptcy Act 1967 - Part payment by third party in full settlement of bankrupt's debts - Whether court has discretion to accept - Whether court may annul adjudication order - Whether bankrupt's debts must be paid in full*

BANKRUPTCY: *Official Assignee - Dealings in estate of bankrupt - Whether must be made through Official Assignee - Private arrangements or acts - Whether must have consent or sanction of Official Assignee - Part payment by third party in full settlement of bankrupt's debts - Whether valid - Whether adjudication order should be annulled*

The creditor bank had earlier obtained judgment against the debtor in the sum of RM1,500,000. Thereafter, receiving and adjudication orders were made against the debtor. Subsequently, a third party ('Chin') entered into negotiations with the creditor, pursuant to which, a sum of RM500,000 was paid by Chin to the creditor in full settlement of the said debt. The debtor then filed a notice of motion under s. 105 of the Bankruptcy Act 1967 ('the Act') for the annulment of the adjudication. The official assignee ('the OA') opposed the motion on the grounds that the debtor had not settled the debt in full, that no payment had been made to the OA, and that the application under s. 105 of the Act was misconceived and an application under s. 18 thereof should have been made instead.

Held:

[1] The jurisdiction to annul is discretionary; in the absence of special circumstances, it will not be a good exercise of discretion to make an order of annulment in circumstances where the bankrupt would not have been granted an order of discharge had he applied for one.

[1a] Bankruptcy law is penal in nature; the court must apply a strict construction as is required in criminal legislation.

[1b] Section 105(1) of the Act leaves the court with **no** discretion to accept a sum less than the proved debts in full settlement of the debts of the bankrupt. The words in the said section – "… where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full … the court may annul the adjudication," – mean that the court can exercise its discretion **only** when the debts are paid in full.

[2] The OA is the trustee of the estate of the bankrupt; it is incumbent that all dealings with the estate be made through him. Once receiving and adjudication orders are made, the bankrupt's estate vests with the OA and, under s. 38(1)(a) of the Act, the OA must be consulted in any action intended by the bankrupt which may be detrimental to his creditors. No one has the right to interfere or intermeddle in the estate of the bankrupt without the prior sanction or consent of the OA. Any dealings in the estate of the bankrupt may validly be made through and/or by joining the OA as a party. Whatever private arrangement or act without reference to the OA is not binding on the estate and stands invalid.

[Motion dismissed.]

Cases referred to:

Kwong Yik Bank Bhd v. Hah Chiew Yin Yin [1985] 2 CLJ 31 ***(foll)***
Re Hester [1889] 22 QBD 632 ***(foll)***
Re Keet [1905] 2 KB 666 ***(refd)***
Sabah Bank v. Syarikat Bintang Tengah [1992] 2 MLJ 588 ***(cit)***

Legislation referred to:

Bankruptcy Act 1967, ss. 18, 38(1)(a), 105(1)
Bankruptcy Act 1914 [UK], s. 29(1), (4)

For the debtor - Wong Siong Ling; M/s Chong Brothers & Advoc
For the creditor - Ling Nee Wen; M/s Ling & Advoc
For the official assignee - Ko Fui Loong (Ishak Bakri with him)

Reported by Gan Peng Chiang

JUDGMENT

Muhammad Kamil Awang J:

The creditor obtained judgment against Ting Nguk Yong (the debtor) in a sum of RM1.5 million together with interest and costs. Based on this judgment, an order of adjudication and receiving order were made against the debtor on 20 January 1996. In 1997 one Mr. Paul Chin Sing, a third party had approached and entered into negotiation with the creditor, whereby they agreed

that the third party would pay the creditor a sum of RM500,000 towards the debtor's debt in full settlement of the debt. The payment was made in five monthly instalments of RM100,000 each. On 15 January 1998 the creditor had informed the third party that it had received the RM500,000 as a full settlement of the debt. The debtor then filed a notice of motion under s. 105 of the Bankruptcy Act 1967 for the annulment of the adjudication.

The official assignee opposed this application on the grounds that the debtor had not settled the debt in full, and that no payment had been made to the official assignee. He further contended that the application under s. 105 was misconceived, it should have been an application made under s. 18 of the Bankruptcy Act.

The jurisdiction to annul is discretionary, and it would not, in the absence of special circumstances, be a good exercise of discretion to make an order of annulment where, if the bankrupt were applying for an order of discharge, an order of discharge would not be granted:
Re Keet [1905] 2 KB 666 per Sirling LJ at p. 677.

Where the funds for payment of debts are being provided by a third party the terms of sub-s. (1) read with sub-s. (4) of s. 29 Bankruptcy Act 1914, would appear to require him to commit his money unconditionally by payment to the trustee, so that the court can ascertain that the debts are paid or funds are available for payment, but presumably the court could give leave for conditional deposit to be made, to abide its decision on merits of the application, namely, its assessment of the bankrupt's conduct.

Our Bankruptcy Act 1967 is modeled along the English Bankruptcy Act 1914 and the phrase in the second limb of s. 105(1) of our Act is in *pari materia* with the words in the second limb of s. 29 of the 1914 Act. Section 105(1) of the Bankruptcy Act 1967 states:

> Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that the proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

Here we are concerned with the second limb of sub-s. (1) of s. 105. As the bankruptcy law is penal in nature, the court has to apply a strict construction as is required in a criminal legislation. The relevant second limb reads, "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full ... the court may annul the adjudication." The phrase means what

it says, when the debts are paid in full then the court may exercise its power under s. 105. It leaves the court with no discretion whether or not to accept a sum less than the proved debts in full settlement of the debts in the estate of the bankrupt. This is well illustrated in the Federal Court case of *Kwong Yik Bank Bhd v. Hah Chiew Yin Yin* [1985] 2 MLJ 452. In that case, the respondent, in 1981, owed the bank (the appellant) a sum of $30,000 and thereupon she was adjudged a bankrupt. Subsequently, her husband approached the appellant and paid a sum of $16,000 to the appellant in full settlement of the respondent's debt. The respondent thereupon filed a motion to have the adjudication annulled on the ground that the debts of the bankrupt had been paid in full. The learned trial judge found on the documentary evidence that the appellant had agreed to accept and had accepted $16,000 in full settlement and there was no merit in the objection of the appellant who opposed the motion. He therefore granted an order in terms of the notice of motion. On appeal, the Federal Court held that the respondent (bankrupt) had failed to satisfy that the debt lawfully due to the appellant had been paid in full in cash and therefore the order of the learned judge in annulling the adjudication order must be set aside.

His Lordship, Seah FJ, said at p. 453 *(ibid)*:

> The meaning of these words 'where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full' was considered by the English Court of Appeal in the case of *In re Keet (supra)*. Although the decision was based on section 35 of the English Bankruptcy Act 1883 it is not disputed that the section corresponded to section 29(1) of the 1914 Act. *In re Keet*, it was held that to satisfy the section the "debts" – including at least all debts which have been actually and properly proved in the bankruptcy – must have been fully paid in cash, and that the second limb is not satisfied by the unconditional release given to the bankrupt by his creditors. *Keet's* case was followed some fifty-seven years later by Cross J in *More v. More*. We have no doubt as to the soundness of this interpretation.

In relation to payment of the debtor's debt by a third party, it is pertinent to refer to the observations of Fry LJ in *In re Hester* [1889] 22 QBD 632 at p. 641:

> The appeal is based on the idle notion that the court is bound by the consents of the creditors obtained, not at a meeting of the creditors, not after a full and open discussion of the rights and interest of the parties and the general position of things, but obtained by the debtor going round to his various creditors, and procuring the receipts of their debts, or consents to the rescission of the receiving order, upon what representation and in what manner we do not know. It is an idle notion that the court is bound by the consent of the creditors. The court has far larger and more important duties to perform than merely to consider what the creditors have consented to the rescinding of the

> order. ... We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interest, but we have a duty with regard to the commercial morality of the country.

Further, in my view, the official assignee is a trustee of the estate of the bankrupt, it is incumbent that all dealings with the estate of the bankrupt must be made through the official assignee. Once receiving and adjudication orders are made, the bankrupt's estate vests with the official assignee and under s. 38(1)(a) of the Bankruptcy Act 1967, the official assignee must be consulted in any action intended by the bankrupt which may be detrimental to his creditors. See *Sabah Bank v. Syarikat Bintang Tengah* [1992] 2 MLJ 588. I do not think it is proper for anyone to settle the debts of the estate of the bankrupt without the knowledge or reference to the official assignee. Legally, when an adjudication order is made against the bankrupt, he ceases to enjoy the full capacity of a normal person. In the normal scheme of things, the State has by statute created an institution, the official assignee, upon whom is entrusted the duty to administer the bankruptcy laws, and to look after the affairs of the estate of the bankrupt. No one has the right to interfere or intermeddle in the estate of the bankrupt without the prior sanction or consent of the official assignee. In other words, any dealings in relation to the estate may validly be made through and/or by joining the official assignee as a party. Whatever private arrangement or act without reference to the official assignee is not binding on the estate, and stands invalid. As a matter of fact, matters that affect the estate of the bankrupt are very much the concern or within the purview of the official assignee. This is the spirit and intendment of the Bankruptcy Act 1967, and in construing the Act it is to be borne in mind the observations of Fry LJ in *In re Hester (supra)*:

> I conceive that one of the objects of the statute was, if not put to an end to, yet at least to discourage, private arrangements between a debtor and his creditors. Anyone who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act ...

From the evidence adduced, the debtor has failed to satisfy the court that the proved debts lawfully due to the estate of the debtor have been paid in full, and I would dismiss the motion with costs.

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